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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1563

CITY OF EASTLAKE, et al.,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

Brief of Amicus Curiae State of California

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JURISDICTIONAL STATEMENT

Pursuant to 28 U. S. C. § 1257(3), this Honorable Court has granted a petition for a writ of certiorari to review a decision of the Supreme Court of the State of Ohio. This amicus curiae brief is respectfully submitted by the State of California, pursuant to Rule 42(4) of this Honorable Court, by and through its Attorney General, and acting at the request of the California Coastal Zone Conservation Commission.[1]

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1. The California Coastal Zone Conservation Commission is a governmental agency of the State of California, established by an initiative enacted by the People of California on November 7, 1972. California Public Resources Code, §§ 27000 *et seq.* Its purpose is to adopt a comprehensive plan for the permanent protection of the resources of the California coastal zone, and, during the interim period required for the formulation of such a plan, to protect those resources by means of an extensive permit system. The adoption by initiative of the California Coastal Zone Conservation Act has been upheld against constitutional attack. ***CEEED v. California Coastal Zone Conservation Commission,*** 43 Cal. App. 3d 306 (1974).

INTEREST OF THE STATE OF CALIFORNIA

The California Constitution, Article IV, section 1, provides:

> "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Article IV, section 25, of the California Constitution further provides:

> "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. This section does not affect a city having a charter."

Thus, under California law, the powers of referendum and initiative are powers reserved by the people from the legislative authority generally delegated to their elected representatives; this reservation of powers applies not only to state statutes, but also to ordinances of cities and counties.[2]

The decision below, 41 Ohio St. 2d 187, 324 N. E. 2d 740, holding that a municipal charter provision requiring a mandatory referendum on each change in the municipality's zoning ordinance constituted an unconstitutional delega-

2. The California Constitutional sections were enacted by the People of California at the election of November 8, 1966. Their predecessor section (former California Constitution, Article IV, section 1), insofar as it pertained to the initiative and referendum powers, was added in 1911, as part of the Progressive reform program of the early 1900's. The original California Constitution of 1849, Article VIII, had also contained a referendum provision. See generally, Crouch, *The Initiative and Referendum in California* (1950).

The language of Article IV, section 25, has not been interpreted to mean that the electors of a California charter city do not have the powers of initiative and referendum. Rather, it has been read to mean that a charter may add to the power reserved by the Constitution, but may not lessen it. *Hunt v. Mayor and Council of The City of Riverside,* 31 Cal. 2d 619, 622-623 (1948).

tion of legislative power threatens to undermine these provisions of the California Constitution, provisions which the Court has previously recognized as embodying a "devotion to democracy." *James v. Valtierra,* 402 U.S. 137 (1971). For that reason, California files this amicus curiae brief in support of petitioner City of Eastlake.

I. A Provision of a City Charter Providing for an Automatic Referendum on any Change in a Comprehensive Zoning Plan Does Not Constitute an Unlawful Delegation of Legislative Power to the People of the City.

A.

The Ohio Supreme Court concluded that the charter provision of the City of Eastlake which provides for an automatic referendum on any legislative change in a comprehensive zoning plan constituted an unlawful delegation of the legislative power of the City to the People of the City, and therefore violated the Fourteenth Amendment of the United States Constitution. 41 Ohio St. 2d at p. 198. In reaching this conclusion, the Ohio Court relied on two inapposite decisions of this Court, and distinguished both *Thomas Cusack Co. v. Chicago,* 242 U. S. 526 (1917), and the more recent decision of *James v. Valtierra, supra,* 402 U. S. 137. As we shall explain below, the decisions upon which the Ohio Court relied are inapposite, since they deal not with City-wide referenda, but with limited "expression[s] of neighborhood preference for restraints . . . ." *Southern Alameda Span. Sp. Org. v. City of Union City,* 424 F.2d 291 (9th Cir. 1970). Moreover, even if such cases are pertinent here, the Court's decision in *Thomas Cusack Co. v. Chicago, supra,* upholding a neighborhood consent requirement, is controlling. More importantly, however, the Court's decision in *James v. Valtierra, supra,* expressly dealing with the power of referendum, is determinative.

In invalidating the Eastlake Charter provision, the Ohio Court relied upon *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U. S. 116 (1928) and *Eubank v. City of Richmond,* 226 U. S. 137 (1912). *Roberge* involved a Seattle ordinance permitting the construction of a philanthropic home, but requiring in addition the consent of the owners of two-thirds of the property within four hundred feet of the proposed building. *Eubank* considered the validity of a Richmond ordinance requiring a committee on streets to establish a building setback line for all of the buildings on a particular block, whenever two-thirds of the property owners of the block so requested. Each case thus dealt only with the expression of particular neighborhood interests; each ordinance legalized only a neighborhood preference, without reference to whether that preference would in fact best serve the public interest of the city as a whole. Thus, neither case is determinative of the validity of a referendum in which the electorate of an entire city participate.

Even if such non-referendum cases are pertinent here, moreover, *Thomas Cusack Co. v. Chicago, supra,* 242 U. S. 526 (1917), is controlling. *Cusack* upheld a Chicago ordinance which prohibited the erection of any billboard in a residential block, unless consent was first obtained from a majority of the owners of property fronting on the block. *Cusack* thus establishes the validity of a procedure by which a reasonable prohibition on use may be altered by those directly affected by the proposed use. *Accord: In re Petersen,* 51 Cal. 2d 177 (1958).

If such neighborhood consent requirements can be analogized to city-wide referenda, the holding of *Cusack* must apply here. Forest City Enterprises held its property subject to the limited industrial use designation imposed by the zoning ordinances of Eastlake. Like the consent sought

by Cusack Company, Forest City Enterprises sought to have the prohibitions imposed by the limited industrial use designation altered, by applying for rezoning of its property to a multi-family high-rise designation. The "consent" required by the City of Eastlake for the alteration of the previous restriction, however, was not only approval by the City, but also by its electorate. Thus, similar to *Cusack,* Forest City Enterprises sought only an alteration of a previously established reasonable prohibition. Unlike both *Roberge* and *Eubank,* however, the action of the People in rejecting that alteration could not result in an unreasonable action, since the effect of such a rejection would be only to leave in effect a previously adopted zoning measure of the Eastlake City Council. Particularly pertinent here is the observation of the Ohio Court that Forest City Enterprises did "not claim[ ], nor does the record indicate, that the zoning of [Forest City Enterprise's] 8-acre parcel for industrial use is unreasonable and unconstitutional." 41 Ohio St. 2d at p. 191. Accordingly, if any of the cases discussed by the Ohio Court are of any significance here, it is *Cusack* that is controlling.

In our view, however, these cases dealing with "ambiguously founded neighborhood preference[s]" are completely inapposite to the right of referendum, "an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." *Southern Alameda Span. Sp. Org. v. City of Union City, supra,* 424 F. 2d 291, 294. They do not serve as precedent for consideration of a legislative scheme for referenda on zoning changes which merely "ensures that *all* the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public

services . . . [and which] gives them a voice in decisions that will affect the future development of their own community." *James v. Valtierra, supra,* 402 U. S. 137, 143 (emphasis added). On this point, *James v. Valtierra, supra,* is dispositive. The Court there upheld a California referendum procedure for governmental decisions concerning low-rent housing projects, against equal protection claims, and the analysis undertaken by the Court is applicable here.

The Ohio Court nonetheless purported to distinguish *Valtierra* on several grounds. It first noted that the referendum provision there involved did not concern zoning, but rather the approval or disapproval of low-rent housing. Second, it noted this Court's emphasis on the community interest in participating in governmental decisions which might lead to large expenditures of local governmental funds for increased public services.

The first ground relied upon by the Ohio Court ignores the very purpose for which Forest City Enterprises sought rezoning—to construct multi-family, high-rise apartments. The second ground, moreover, ignores the reality that the rezoning sought by Forest City Enterprises and subsequent construction under the new designation could have exactly the same effect as the low-rent housing in *Valtierra:* increased traffic, an increased burden on schools and public utilities, as well as an alteration of the physical and social characteristics of the neighborhood. As the California Supreme Court has noted in a similar case:

> "The right of referendum with respect to zoning ordinances is essential for the protection of the rights of the electors of each city. A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance. What is done

> with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property." *Johnston v. City of Claremont,* 49 Cal. 2d 826, 837 (1958).

For these reasons, we believe that *James v. Valtierra* is controlling here.

B.

Even apart from the cases discussed above, there is a more fundamental reason why the Ohio Court incorrectly concluded that the Eastlake referendum procedure constituted an unlawful delegation of legislative power: the People are, of course, the ultimate repository of legislative power. The powers of referendum and initiative are powers reserved and retained by the People, and not the exercise of rights granted to them. Any legislative body, whether it be municipal, state or federal, draws its authority to legislate only from a delegation of power from the People to their elected representatives. *Federalist Papers,* No. 39; *Ley v. Dominguez,* 212 Cal. 587, 593 (1931); *Dwyer v. City Council,* 200 Cal. 505, 513 (1927). A conclusion that a referendum is an unlawful delegation of legislative power is thus not only a complete *non sequitur,* but also a perversion of the touchstone of the American political system that all power is inherent in the People.

The Ohio Constitution, like the California constitution,[3] specifically provides that the powers of initiative and ref-

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3. Article II, section 1f of the Ohio Constitution provides, in pertinent part:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action . . . ."

Article IV, section 25 of the California Constitution provides in pertinent part:

> "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide . . . ." See also fn. 2, *ante.*

erendum are reserved to the People of each municipality. There thus can be no question here of an unlawful delegation of legislative power; by the enactment of the pertinent provisions of the Eastlake Charter, the Eastlake electorate has simply withdrawn from the legislative body, and reserved to themselves, the right to exercise a part of their inherent legislative power.

These principles have been long recognized by this Court. In *Pacific States Telephone and Telegraph Co. v. Oregon,* 223 U. S. 118 (1912) and *Kiernan v. Portland,* 223 U. S. 151 (1912), the Court considered challenges to the initiative and referendum powers exercised, respectively, by a state and by a municipality. The Court concluded "the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental . . . ." (223 U. S. at p. 151), and that accordingly the court lacked jurisdiction over the claim. See also *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 612 (1937); *Davis v. Ohio,* 241 U. S. 565 (1916); and *Hunter v. Erickson,* 393 U. S. 385, 393-396 (1969) (concurring opinion). Indeed, in the *Highland Farms Dairy* case, the Court noted that "[t]he Constitution of the United States in the circumstances here exhibited has no voice upon the subject." *Accord: Ranjel v. Lansing,* 417 F. 2d 321, *cert. den.* 397 U. S. 980 (6th Cir. 1969); *Spaulding v. Blair,* 403 F.2d 862 (4th Cir. 1968). As a result, the determination of both the Constitution of Ohio and the Charter of the City of Eastlake that the People retained the right of referendum is purely a political question; it does not constitute an unconstitutional delegation of legislative power to the People.

C.

Several further factors involved in the Eastlake Charter procedure appear to have contributed to the decision of

the Ohio Court. The Court first noted that the referendum procedure provided "no assurance that the result reached thereby would be reasonable or rational." 41 Ohio St. 2d at p. 196. Second, the Court declared that "[i]t can scarcely be contended that every proposed land use change, no matter how small, in a city with a population of 20,000, either involves or allows community-wide policy-making." 41 Ohio St. 2d at p. 197. Finally, a concurring opinion, in which four of the Ohio justices concurred, attributes motives to the People of Eastlake "to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas." 41 Ohio St. 2d at p. 200. We discuss these factors below.

We fail to see any judicially cognizable difference in the possibility of abuse inherent in the formulation of a particular zoning regulation by either the legislative or referendum process. Neither the referendum nor the legislative process provides complete assurance of reasonable results. In both cases, however, a capricious result is subject to invalidation by the courts. Both methods involve a hearing and determination before the appropriate municipal bodies. If the municipality determines that a change in the existing zoning scheme is warranted, the matter is then set for vote of the People. If the People affirm the decision of their government, the zoning change is validated. If it is rejected, however, the previous zoning change simply remains in effect. The record in this case does not demonstrate that the rejection of Forest City Enterprise's request was unreasonable; even if it did, moreover, the appropriate remedy would be invalidation of the referendum result, rather than emasculation of the democratic process.

The second objection of the Ohio Court ignores the basic function served by a comprehensive zoning plan in guiding

the future growth of a municipality; as the California Supreme Court has noted in another context, zoning and other land use regulation "expresses both a concern for our present quality of life and our collective fiduciary responsibility to the future . . . ." *HFH Ltd. v. Superior Court,* .... Cal. 3d. ...., ... (1975). The restrictions relating to any particular portion of a municipality are an integral part of an entire scheme of community planning, and are the expression of a definite policy. An amendment to a zoning ordinance, however, alters that plan, and, in effect, alters the future course and nature of the community; the change proposed here from industrial to multi-family high-rise demonstrates that principle well, since the future character of the community is affected by that decision.

Even more significantly, however, the contention again overlooks the fact that the referendum procedure interjects a significant constitutional ingredient. Even if it were conceded that the ordinance affected only a small proportion of the electorate of the City, there is nothing inconsistent in permitting the entire electorate to consider it in referendum. Since the legislative body of the City of Eastlake admittedly had authority to enact the ordinance requested by Forest City Enterprises, and since the legislative body exercises only that power derived from the electorate, the alleged character of the ordinance is not of itself sufficient to preclude a referendum by the electorate. *Dwyer v. City Council, supra,* 200 Cal. 505, 513-515.

Finally, the opinion of the concurring justices of the Ohio Court demonstrates a disturbing distrust of the American democratic process and the formulation by the People of their own future. As the City of Eastlake noted in its petition for hearing, the concurring opinion "is a manifestation of a new distrust of democracy and

democratic processes in favor of an elitism that considers itself a wiser guide for the solution of economic and social policies, an elitism contemptuous of the wisdom and fairness of the ordinary voter . . . ." Petition for Writ of Certiorari, p. 11.

This case does not in any manner deal either with an attempt by a municipality to halt all growth within its borders or to regulate growth, pending consideration of its future. *Cf. Construction Industry Association v. Petaluma,* ..... F.2d ..... (9th Cir. 1975). The Eastlake referendum procedure does not involve inherently suspect racial classifications, *cf. Hunter v. Erickson, supra,* 393 U. S. 385 (1969) and *Reitman v. Mulkey,* 387 U. S. 369 (1967), nor does it involve a classification based on wealth. *Cf. James v. Valtierra, supra,* 402 U. S. 137. At the trial below, the matter was submitted for decision only on the admitted portions of the complaint which raised the validity of the Eastlake Charter provision on its face. None of the allegations of the complaint raised the question of racial or wealth classifications. The record likewise fails to demonstrate either that the referendum procedure is designed to exclude low and moderate income housing, or that the effect of its operation has been to create such an exclusion. *Cf. Village of Belle Terre v. Boraas,* 416 U. S. 1, 14 (1974) (dissenting opinion). Under these circumstances, the only permissible conclusion is that the Eastlake provisions for referenda "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra, supra,* 402 U. S. 137, 141.[4]

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4. The Ohio Court did not discuss or utilize the 55% majority requirement of the charter provision as a basis for its holding of unconstitutionality. Given the neutral characteristics of the referendum requirement, the high approval requirement does not constitute an equal protection violation. *Gordon v. Lance,* 403 U. S. 1 (1971).

CONCLUSION

The decision of the Ohio Court ignores the fundamental principle of the American political system that all political power is inherent in the People, that the People may confer their legislative power upon their elected representatives, but that they retain the ultimate power to review any legislation enacted.

California accordingly joins with Eastlake in urging that the judgment of the Supreme Court of Ohio be reversed.

Respectfully submitted,

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